ROBERT R. KRILICH, SR.,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 02-3161

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

December 6, 2002*, Submitted
December 31, 2002, Decided

* This appeal has been submitted under Operating Procedure 6(b) to the panel that decided prior appeals in the case. The panel has concluded that additional oral argument is unnecessary.

COUNSEL: For ROBERT R. KRILICH, SR., Petitioner-Appellant: Stanley L. Hill, HILL & ASSOCIATES, Chicago, IL USA. For UNITED STATES OF AMERICA, Respondent-Appellee: Patrick J. King, Jr., OFFICE OF THE UNITED STATES ATTORNEY, Chicago, IL USA.

JUDGES: Before Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge.

ORDER

Robert Krilich has been sentenced three times following his criminal convictions for bank fraud and operating an enterprise through a pattern of racketeering. The convictions have been affirmed, but the first two sentences were vacated, *see* 159 F.3d 1020 (1998), and 257 F.3d 689 (2001); the third is affirmed by an order issued today. Krilich sought collateral

review of the first sentence. That petition was denied by the district court, and we declined to issue a certificate of appealability. Now we have Krilich's collateral attack on his second sentence. What significance this could have is unclear, given that the second sentence was vacated more than a year ago. But the district court denied this petition on the merits, and Krilich seeks a certificate of appealability.

The district court should not have entertained Krilich's request. It is his second collateral attack and therefore required this court's approval under 28 U.S.C. § 2255 ¶ 8. Krilich did not seek permission to file, and the argument he presents--that the court violated the Constitution's Ex Post Facto Clause by considering, when imposing sentence, the loss inflicted by his offenses--does not meet the statutory criteria for a second or successive collateral attack. Krilich's lawyers may believe that § 2255 ¶ 8 does not apply because he has been sentenced more than once. But we held in *Dahler v. United States*, 259 F.3d 763 (7th Cir. 2001), that resentencing resets the counter for purposes of § 2255 ¶ 8 only if the collateral attack concerns an issue that first arises at the resentencing. Krilich's argument, by contrast, has been in the case all along. His application for a certificate of appealability opens by saying that "this is the eighth time the petitioner has attempted to have his ex post facto constitutional claim addressed by a federal court." It was raised on Krilich's initial appeal to this court, and it *was* resolved then. We did not discuss it, but we considered all arguments presented, and a court of appeals is not obliged to discuss weak contentions. So this collateral attack is Krilich's second, which does not have (and could not receive) approval under § 2255 ¶ 8.

The judgment of the district court is vacated, and the matter is remanded with instructions to dismiss for want of jurisdiction. See *Nunez v. United States*, 96 F.3d 990 (7th Cir. 1996).

UNITED STATES OF AMERICA

v.

ROBERT KRILICH (94 CR 419).

No. 00 C 6078

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Krilich's § 2255 motion to vacate, modify, or correct his sentence is denied. Defendant to take nothing. All matters in controversy having been resolved, final judgment is hereby entered in favor the United States of America and against Robert Krilich.

Michael W. Dobbins, Clerk of Court

/s/

Stephen C. Tokoph, Deputy Clerk

Date: Jun 4, 2002

ORDER

This matter is before the court on Petitioner Robert Krilich's motion to vacate, modify, or correct his sentence pursuant to 28 U.S.C. § 2255. For the reasons set forth below, the motion is denied.

This case has a long and tortuous history. Krilich has been sentenced on three separate occasions for his September 1995 conviction for racketeering and other related offenses. He has filed four appeals, the last of which is still pending,

and his is his second go-round before this court on a § 2255 petition. The first, which we decided on April 2001, focused on his first sentencing. He now seeks to challenge the second and third sentencing on three grounds: the sentencing judge had no jurisdiction to make certain findings in ruling on a posttrial motion; the amount of forfeiture imposed upon him; and a claim that the sentencing guideline applied to his offense was not in effect when his crimes were committed, making its use a violation of the ex post facto clause of the Constitution.

Krilich raised his ex post facto argument in his second appellate brief but contests that the Seventh Circuit did not address the issue in its opinion. The text of the opinion does not directly examine whether the application of the sentencing guideline was constitutionally impermissible. Instead, the court of appeals noted that Krilich launched several different attacks on his sentence and dealt with the only one they felt needed further analysis: the calculation of his gain. *United States v. Krilich*, 257 F.3d 689, 69192 (7th Cir. 2001). The overall impression of this passage is that the court concluded that the other challenges did not hold sufficient merit to warrant discussion. In other words, the issue has been raised and considered on direct appeal, making it unsuitable as a basis for a § 2255 petition unless Krilich can demonstrate changed circumstances. *Norris v. United States*, 687 F.2d 899, 900 (7th Cir. 1982).

Even assuming that the Seventh Circuit did not consider his ex post facto claim, we independently conclude that it is without merit. The guideline in effect at the time Krilich committed his offenses does not use the exact phrase "loss to the government" that was added to later versions. *Compare* U.S.S.G. § 2C1.1 (a)(2)(A) (2001) *with* U.S.S.G. § 2C1.1(a)(2)(A) (1990). Instead, the older section refers to value, benefit, or benefit to be received from the illegal activity. Krilich cannot argue that his activities would have only resulted in a loss to the government without conferring a commensurate benefit to him or intended to be received by

him, placing him solidly within this section of the guidelines and leading to the table the sentencing judge used to compute the offence level increased based on the amount of the loss effected by the defendant's actions. U.S.S.G. § 2F1.1 (1990). Although the former wording of the guideline is not as specific as the current version, it is clear that Krilich was within the ambit of the previous guideline's substance, and the textual changes do not implicate ex post facto protections.

The remaining grounds Krilich brings up are not based in the Constitution, and he did not raise them during his direct appeal. This failure precludes their resolution by this court. *Bontkowski v. United States*, 850 F.2d 306, 313 (7th Cir. 1988). Finally, we acknowledge the last-ditch effort in Krilich's reply to raise an ineffective assistance of counsel claim only to note its frivolousness; because the application of the earlier guideline does not violate Krilich's constitutional rights, counsel was under no obligation to alert him of the different working of the two guidelines.

Based on the foregoing, Krilich's § 2255 motion to vacate, modify, or correct his sentence is denied.

/s/
Charles P. Kocoras
U.S. District Judge

Dated: Jun 4, 2002

ROBERT R. KRILICH, SR.,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA.
Respondent-Appellee.

No. 02-3161

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

April 21, 2003, Decided

COUNSEL: For Robert R. Krilich, Sr., Petitioner-Appellant: Stanley L. Hill, HILL & ASSOCIATES, Chicago, IL USA. For United States of America, Respondent-Appellee: Patrick J. King, Jr., OFFICE OF THE UNITED STATES ATTORNEY, Chicago, IL USA.

JUDGES: Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge.

ORDER

Petitioner-appellant filed a petition for rehearing and rehearing en banc on February 14, 2003. No judge in regular active service has requested a vote on the petition for rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

* Chief Judge Flaum and Judge Williams did not participate in the consideration of this matter.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America,	)
	)
	)
v.	) No. 94 CR 419
	)
	) HONORABLE
Robert S. Krilich, Sr.	) DAVID H. COAR
	)
	)

MEMORANDUM OPINION & ORDER

On November 1, 2000, this Court sentenced defendant Robert Krilich to eighty-seven months confinement in a federal prison and issued a statement of reasons for that order. Krilich now moves under Federal Rule of Criminal Procedure 35(c), to correct or reduce his sentence. For the reasons stated below, this motion is DENIED.

Background

Krilich was convicted of fourteen counts of fraud under 18 U.S.C. § 1014, and conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d). On June 23, 1997, Judge Grady sentenced Krilich to sixty-four months in prison. Krilich appealed both his conviction and his sentence and the United States cross-appealed his sentence. On October 27, 1998, the United States Court of Appeals for the Seventh Circuit affirmed Krilich's convictions but vacated Judge Grady's sentencing order and remanded the case for re-sentencing. On October 8, 1999, Krilich's case was reassigned to his Court pursuant to Local General Rule 2.30F.

This Court originally stated that it would rely on the actual loss to the government as the basis for Krilich's sentence on remand, as the Court of Appeals for the Seventh Circuit has directed in *United States v. Krilich.* 159 F.3d 1020, 1031 (7th Cir. 1998). Before this Court issued its written statement of reasons, the Internal Revenue Service issued an adverse determination with respect to the bonds at issue in this case. The IRS found that the interest on the bonds was not tax free as originally intended. Krilich subsequently moved to set aside this Court's oral ruling regarding tax loss. In the November 1, 2000, memorandum opinion, this Court relied primarily on the "intended loss" to the government as the basis for Krilich's sentence. Now, Krilich argues that the relevant guideline – the one that was in place when Krilich committed his crime – does not permit this Court to consider the loss to the government as a basis for enhancing the base offense level.

Analysis

Krilich's motion is denied because the benefit to him, like the intended loss to the government, is also greater than $410 million. In this motion, even Krilich acknowledges that the benefit to him is a basis for enhancing his sentence. The Seventh Circuit recognizes in its opinion that there is a correlation between Krilich's gain and the government's loss, albeit not an exact correlation. *See Krilich*, 159 F.3d at 1031. Of more significance here, though, is the testimony of David Joseph Ross, who is the government finance expert. As noted in this court's previous opinion. Ross testified that:

> both the benefit that Krilich would have received from being able to borrow at a tax-free interest rate and the loss that the United States Treasury would have suffered had Krilich been able to borrow at a tax-free interest rate . . . would be about $14.2 million.

Mem. Opinion, Nov. 1, 2002, at 2.[1] In response to Krilich's objections to Ross's opinion, this Court also noted that "Krilich d[id] not offer a single "fact'" to rebut that opinion. *Id.* at 5. Krilich has not presented this Court with anything that would alter that original conclusion. Krilich makes too much of the fact that in the original memorandum opinion, this Court "reluctantly conclude[d] that Krilich may be correct "that he ultimately lost money on the project." As noted in footnote four of that opinion, this Court doubted the propriety of many of the so-called "deductions" that Krilich used to conclude that he had actually suffered a loss. At the bottom, Ross's testimony provides a more substantial basis for determining the benefit and persuades this Court that the benefit to Krilich was approximately $14 million. In view of Ross's factually uncontradicted opinion, this Court again concludes that the benefit to Krilich exceeds $10 million and that on the basis of either the benefit to him or the intended loss to the government, the sentence enhancement remains the same.

CONCLUSION

For the foregoing reasons, Krilich's motion is DENIED.

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[1] Ross actually estimated the benefit to Krilich as $14.6 million. See Tr. of Proceedings, January 28, 2000, at 23.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America,	)
	)
	)
v.	) No. 94 CR 419
	)
	) HONORABLE
Robert S. Krilich, Sr.	) DAVID H. COAR
	)
	)

MEMORANDUM OPINION

Defendant Robert S. Krilich, Sr. is before this Court for sentencing. For the reasons stated below, this Court sentences Krilich and commits his to the Bureau of Prisons for a term of 87 months to be followed by three years supervised release.

Background

Krilich was convicted of fourteen counts of fraud under 18 U.S.C. § 1014, and conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d). On June 23, 1997, Judge Grady sentenced Krilich to sixty-four months in prison. Krilich appealed both his conviction and his sentence and the United States cross-appealed his sentence. On October 27, 1998, the United States Court of Appeals for the Seventh Circuit affirmed Krilich's convictions but vacated Judge Grady's sentencing order and remanded the case for re-sentencing. On October 8, 1999, Krilich's case was reassigned to his Court pursuant to Local General Rule 2.30F.

According to the Seventh Circuit, this Court was to consider on remand the revenue that Krilich's bribery scheme[1] caused the Internal Revenue Service to lose. *See United States v. Krilich*, 159 F.3d 1020, 1031 (7th Cir. 1999) ("the existence of a substantial tax loss is undeniable"). Additionally, the Seventh Circuit stated that this Court "should give no weight to. . .the disparity between Krilich's presumptive sentence under § 2F1.1 and [the bribee,] Mayor Sarallo's actual sentence." *Id.* at 1031. Beginning on January 28, 2000, this Court heard expert testimony to undertake calculation of the tax loss to the government, despite the Seventh Circuit's implication that a precise calculation would be difficult. *Id.* ("[c]alculating the actual loss in tax revenues from providing investors with a tax shield that the law does not allow is quite complex . . . .")

The government presented testimony from David Joseph Ross, who is senior vice president of a consulting firm specializing in economic analysis of a variety of legal and regulatory matters. Ross calculated both the benefit that Krilich would have received from being able to borrow at a tax-free rate and the loss that the United States Treasury would have suffered had Krilich been able to borrow at a tax-free interest rate. Assuming that the bonds were tax-free, Ross concluded that both the benefit to Krilich and the loss to the government would be about $14.2 million. Crediting and relying only on the estimated actual loss to the government from lost tax revenue (as opposed to the benefit to Krilich), this Court announced Krilich's sentence and indicated that a written order would be forthcoming.

Before this Court issued its written statement of reasons, the Internal Revenue Service issued an adverse determination with respect to the bonds at issue in this case. The IRS found that the interest on the bonds was not tax free as originally

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[1] Bribery was one of the predicated acts for Krilich's RICO conspiracy conviction.

intended. Krilich subsequently moved to set aside this Court's oral ruling regarding tax loss. According to Krilich, since the IRS determined that the bond interest was taxable, the underlying premise for his sentence enhancement – a tax loss of $14.2 million – ceased to exist. Krilich filed a memorandum in support of his motion to which the government filed a response and to which Krilich, in turn, filed a reply. For the reason stated, below, this Court's initial determination of Krilich's sentence remains the same, albeit for slightly different reasons.

Analysis

"Because the underlying conduct for [Krilich's] RICO conviction was bribery, the relevant [sentencing] guideline is § 2C1.1(b)(2)(A)." *Krilich*, 159 F.3d at 1029. That section provides that "if the value of . . . the loss to the government from the offense. . . exceed[s] $2,000, [the offense level will] increase by the corresponding number of levels from the table in § 2F1.1" U.S. Sentencing Guideline Manual § 2C1.1 (b)(2)(A). The table set forth in Section 2F1.1 varies the sentencing range. . . depending on the amount of loss." United States v. Lauer, 148 F.3d 766, 767 (7th Cir. 1998). A loss greater than $10,000,000, increases the offense level by fifteen levels. *See* U.S. Sentencing Guideline Manual § 2F1.1 (b)(1)(P). The loss mentioned in Section 2F1.1 can be either an actual loss or an intended loss, whichever is greater. *Id.* (citing § 2F1.1, Application Note 7) (further citations omitted). An intended loss is measured by the amount that the defendant put at risk. *See Lauer*, 148 F.3d at 768. Intended loss is not mitigated by a defendant's hope that the victimized party not actually be harmed. *See id.*

Loss to the Government

To calculate the actual loss to the government, the government's expert collected data and compared interest rates on tax-free debt instruments and taxable debt instruments that were otherwise equivalent. The data indicated the difference between the rates demanded for

investment in taxable as opposed to tax-free securities. Based on the data, Ross estimated the interest rate that Krilich would have had to pay if he had been unable to obtain tax-free bonds to finance the project.

Because tax-free bonds financed the project, the investors did not pay taxes to the United States Treasury on the interest that they received. Conversely, if the interest on the bonds had not been tax free, the investors would have had to pay taxes on the interest received. Therefore, the United States lost the benefit of the taxes it would have received but for the fact of the improper attempt at tax-free financing. Applying the interest data previously discussed, Ross concluded that between 1986 and 1991, the loss to the government, assuming a 28% marginal tax rate for investors, would have been $16.5 million. Using the average marginal tax rate for all United States taxpayers, the loss would have amounted to $14.2 million. This Court credited Ross's testimony and found that the government suffered a loss of $14.2 million.

As noted above, after this Court's hearing on actual tax loss and after the oral ruling, the IRS determined that the interest on the bonds in question was taxable. In other words, the "actual loss" estimated by the government's expert was no longer an actual loss. The interest on the bonds turned out to be taxable, not tax-free as intended. The absence of an actual loss of $14.2 million, however, does not save the day for Krilich because he intended the government to lose that revenue. In the parlance of the *Lauer* case, Krilich put $14.2 million "at risk" through his bribery scheme. *See Lauer*, 148 F.3d at 768.[2] Even though Krilich's bribery scheme did not result in the issuance of tax-free bonds, he intended to have tax-free bonds issued. Indeed, this was the ultimate goal of Krilich's bribe. At bottom, if things had turned out as Krilich

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[2] Ross's analysis regarding the actual tax-revenue loss to the government is equally valid with respect to intended loss. In hindsight, Ross's calculations just turned out to be hypothetical estimates of what the government would have lost.

had planned, the tax-free bonds would have been issued and the government would be deprived of $14.2 million in tax revenue. This intended loss is no less tied to Krilich's bribery scheme than the actual loss that would have befallen the government.[3]

Krilich counters both the loss and the gain calculations by positioning that the project actually undertaken thought the tax-free financing was not economically feasible at taxable (higher) interest rates. Krilich therefore concludes that Ross' comparisons between taxable financing and tax-free financing is illusory. In support of this theory, Krilich does not offer a single "fact." Instead, he relies on the testimony of Stan Lazar, an expert in real estate accounting (not real estate finance). Lazar opined that Industrial Revenue Bond Financing is used to create incentives for builders to undertake projects that otherwise would not be built. Neither, Krilich or Lazar, however, offered any support for this sweeping statement. This Court is unwilling to conclude that the mere fact that a condition of financing was that 20% of the project be devoted to low income housing renders the project economically unsound. It is at least equally plausible that Internal Revenue Bond financing was obtained (by way of bribe) to increase the profits for an already viable project simply because of greed. It would have been relatively simple for Krilich to reconstruct the financial analysis of the project and compare the projected results of alternative financing to counter Ross' assumptions. Absent other evidence, the Court rejects Krilich's unsupported analysis because Ross' approach is reasonable.

Krilich also argues that he received no net benefit from the proceeds of the financing. Relying on Application Note 2 to Guideline 2C1.1, Krilich argues that where a contract is awarded in return for a bribe, the measure of net benefit is the

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[3] Because the Court determined that Krilich intended that the government lose $14.2 million in revenue, it is not necessary to address the government's waiver argument.

defendant's profit on the contract. Krilich states further that there was no profit on the contract. He asserts that there was a loss. The Court reluctantly concludes that Krilich may be correct on this latter factual point, but notes that it is legally irrelevant.[4] Since Krilich's offense conduct was intended to cause the government a $14.2 million loss, that amount will be used for applying §2F1.1.

The Court finally rejected Krilich's argument that the "intended loss" doctrine is inapplicable in this case. Krilich analogizes to cases involving fraudulent loan applications and fraudulent contract procurement. Such analogies are not applicable here. In fraudulent loan applications and fraudulent contract procurement cases, an exception is made under the intended loss doctrine for fraudfeasors who intend to perform under contract of loan. *See, e.g., United States v. Schneider*, 930 F.2d 555, 558 (7th Cir. 1991). This exception exists because these fraudfeasors do not actually intend to cause a loss to the government equal to the amount of the loan or perform the full value of the contract. *See, e.g., id.* In stark contrast to these cases, Krilich intended to cause the government a tax loss of approximately $14.2 million despite his attempt to and intention to "perform" under the contract obtained as a result of his bribe to Mayor Sarallo. Unlike the loan or contract procurement cases, Krilich's intent throughout was to have tax-free bonds issue to finance his

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[4] This Court's reluctance stems from a lingering doubt as to whether the "contract" obtained in return for the bribe is limited to the tax-free financing or, as he suggests, encompasses the entire building project. Moreover, Krilich's evidence of detriment (offsetting any benefit he enjoyed) includes several questionable items such as: $2.5 million or more for a criminal defense counsel and incarceration-related matters, the $5 million in personal funds for the purchase of the subseries I bonds (without offsetting that amount by the value of the 26 completed townhouses), and allocation of office and maintenance expenses to the Oakbrook Terrace Project.

project. Tax-free bonds would have deprived the government of revenue that could have otherwise been collected by taxing the interest on taxable bonds.

The parties do not dispute that prior to any consideration of departure, Krilich's base offense level is 17. Since the Court determines that Krilich intended the government to suffer a $14.2 million tax loss, the pre-departure base level is increased 15 levels to 32.

Departure Based on Krilich's Medical Conditions

Krilich also moves for downward departure on the basis of his medical and psychological conditions. Dr. Richard Herbert, who is no longer engaged in active practice, testified that Krilich was a patient of his before Krilich's incarceration and that he saw Krilich a number of times before his incarceration. On cross examination, Dr. Herbert acknowledged that he had not been listed as one of Krilich's treating physicians on forms that Krilich executed upon entry into the custody of the Bureau of Prisons. Additionally, Dr. Herbert stated that he treated Krilich several times "to the extent that I had access to him. He. . .came to my office. I offered treatment and I gave him advice what should be done." Tr. Proceedings Feb. 1, 2002 at 283-84. Dr. Herbert had no records of Krilich's visits, and never did a complete history of Krilich. Dr. Herbert has no particular expertise in the field of cardiology, but this did not defer him from expressing numerous opinions about Krilich's heart condition(s) and the care provided, or not provided, by the Bureau of Prisons. This Court gives no weight to Dr. Herbert's testimony.

Dr. Bernard Rubin is a psychiatrist who testified that Krilich is suffering from at least four serious physical infirmities: (1) chronic cardiovascular disease; (2) chronic peripheral vascular disease with hypertension; (3) obstructive pulmonary disease; and (4) back disease of lumbar and lumboscaral origin. According to Dr. Rubin, Krilich also suffers from a major depressive disorder, characterized by

insomnia, anorexia, "distractibility", hopelessness, suicidal thinking and tearfulness. The supplement to the Presentence Investigation Report also sets out the medical conditions that Mr. Krilich suffers from and the medications he is receiving.

Dr. Rubin also opined as to the effect that prison would have on Krilich. Dr. Rubin believes that there are three difficulties with treatment of physical or psychological problems in prison: (1) prisons are organized punishment; (2) they are organized for security; and (3) medical, surgical and psychological concerns are secondary. Therefore, he concludes that Krilich's various conditions can best be addressed outside of an institutional setting.

The Government argues that because many of Krilich ailments are chronic and because he would suffer from them whether or not he was incarcerated, no departure is warranted. The Court disagrees. Krilich's age and the number and complexity of his ailments render him unlike the "typical" defendant who appears in this court for sentencing. While this Court is aware that the mandatory minimum requirements of the Sentencing Guidelines have created an increased need to provide geriatric treatment for inmates, Krilich's health issues present an unusual profile. The conditions of confinement will undoubtedly aggravate his conditions and make treatment more difficult. Therefore, a departure is warranted. The question, therefore, is the level of departure.

Krilich argues for a substantial departure to a level that would require his immediate release on the theory that treatment of his ailments by the Bureau of Prisons has been inadequate. The issue, however, is whether the Bureau of Prisons is incapable of providing medically reasonable treatment to Krilich. While the manner in which he had been treated in the past is some indication of standards within the Bureau of Prisons and therefore somewhat predictive of future treatment, the issue is broader than whether doctors hired by Krilich would have treated his conditions differently.

This Court has no doubt that a person of Krilich's means could obtain first class medical and psychological treatment outside of a prison environment and will assume, without deciding, that the treatment the Krilich could receive outside of prison would be superior to the treatment he is receiving from the Bureau of Prison. The Court cannot, however, conclude that the treatment that Krilich has received and which he is likely to receive in the future from the Bureau of Prison is so lacking in quality that this Court should depart to a level that requires his immediate release, or to a level at which some alternative to imprisonment would be available. Unfortunately, Krilich has approached the question of departure as an all or nothing proposition. The focus of his proofs and arguments has been an all out assault on continued confinement. He has attempted to show that the BOP has not and will not adequately treat his medical and psychological conditions and therefore the court should depart to level that will allow some form of home detention which permit treatment by his personal treaters. In his single-minded thrust to avoid further incarceration, Krilich has neglected to provide the court with information necessary to readily determine an appropriate departure that takes into account his conditions, measured by the particular manner in which they impose upon him hardships outside of the heartland. Moreover, the guidelines themselves provide little textual guidance in determining the extent of downward departure.

§5H1.4 of the Guidelines provides that while physical condition (of a defendant) is not "ordinarily relevant" in determining whether a departure is warranted, "an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range." The example contained in the guideline refers to a defendant who is so seriously ill or infirm that "home detention may be as efficient as, and less costly than, imprisonment" There is no questions but that a sentence that would have Krilich pay the cost for treatment of his various ailments would be less costly to the government. It is unclear whether such a sentence

would be more "efficient" than a period of imprisonment. If efficiency in this context refers to the possibility that the Bureau of Prisons lacked the ability to treat the defendant in a BOP facility and would have to transport the defendant to a location with the attendant travel and security costs, then there is no showing that the Krilich's circumstances warrant such an approach. If the term is to be read more expansively, taking into account the broad goals of sentencing (See 18 U.S.C. §3553(a)(2)), it is clear that those goals are not served by departing to a level where Krilich escapes a substantial prison term. Neither his physical condition nor the ends of sentencing are served by such a result. Krilich stands convicted of serious crimes which deserve a serious sanction. The fact that he suffers significant medical ailments serves as a reason to mitigate the punishment, not to eliminate it.

None of Krilich's four major illnesses (cardiovascular disease, peripheral vascular disease with hypertension, obstructive pulmonary disease and back disease/lumbar and lumbosacral origin), taken alone, justify a departure. In combination with each other, they present treatment and quality of life difficulties that fall outside the heartland. The court will therefore depart one level for each of the four conditions and an additional level for the interaction of the ailments.

Departure Based on Sentencing Disparity

Krilich also sought a departure based on the argument that the loss amount overstates the seriousness of his conduct. Intertwined within this argument is Krilich's argument of sentencing disparity. According to Krilich, he was deduced into paying the bribe by Mayor Sarallo's officials who where "on the make." These officials received sentences much less severe than that which is called for under the Guidelines for Krilich. Krilich's argument in this regard is exceptionally misguided. While wise enough not to argue that Judge Grady's earlier ruling is the law of the case, Krilich foolishly argues that this departure determination is "certainly entitled

to great weight." Krilich's argument amazingly ignores Seventh Circuit precedent that could not be more on point – namely, the appellate opinion in this case, expressly reversing the decision that Krilich asks this Court to adopt here. *See United States v. Krilich*, 159 F.3d 1020, 1021-22 (7th Cir. 1998). The Seventh Circuit could not have more clearly precluded such consideration. *Id.* ("on remand the Judge should give no weight to. . .the disparity between Krilich's presumptive sentence under §2F1.1 and mayor Sarallo's actual sentence. . .") In addition, as the Government notes, Krilich has not argued on remand that the Guidelines were misapplied in either his or Sarallo's case. The request to depart further is denied.

Conclusion

For the foregoing reasons, this Court sentences Robert S. Krilich, Sr. and commits him to the Bureau of Prisons for a term of 87 months to be followed by three years supervised release.

DATE: November 1, 2000